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Sim Tze Chui v Asian Mining Services Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(M)-2958–11 OF 2011

ABDUL WAHAB PATAIL, ANANTHAM KASINATHER AND ABDUL AZIZ ABD RAHIM JJCA

15 APRIL 2014

Civil Procedure — Proceedings — Proceedings by company — Revocation of power of attorney and declaration that power of attorney null and void — Striking of caveat and declaration of it being null and void — Assessment for damages for caveat entered — Whether company or solicitors authorised to commence legal proceedings against shareholder without director's resolution — Rules of the High Court 1980 O 92 r 4

The first respondent company ('Asian Mining Services') owned 100% of the shares in the second respondent company ('Selinsing Mining'). The appellant ('Sim') was the registered shareholder of 999 shares out of 1,000 shares in Asian Mining Services. The other share was held by the appointed chairman of the Board of Asian Mining Services ('Peter'). When Sim resigned, he remained as the major shareholder of Asian Mining Services and a director of Selinsing Mining. Sim filed an action in the High Court seeking to revoke the power of attorney given to Dakar Security Services Ltd, declaring it and all actions and matters done pursuant to the said power of attorney null and void. The High Court allowed Sim's application (encl 45) as the petitioner and made declarations and orders that rendered all transactions made by Peter Kestel and Dakar Security Services Ltd using the power of attorney and including the transfer of the entire shares of Sim's in Asian Mining Services, cancellation of Sim's shares and issue new share certificates void, and maintained Sim's position. Originating summons was commenced by Asian Mining Services and Selinsing Mining as the plaintiffs naming Sim as the defendant seeking that the private caveat entered by Sim be struck off. Subsequently, the High Court struck off the caveat and damages for entering the caveat were assessed. Asian Mining Services and Selinsing Mining obtained judgment against Sim ordering the latter to pay RM146,785.50 being the actual costs; RM849,500 being rental paid to PKNP and RM532,000 as rental liability paid to PKNP. Sim commenced encl 262 against Asian Mining Services and Selinsing Mining pursuant to O 92 r 4 of the Rules of the High Court 1980 ('the RHC'), seeking orders that the orders be set aside and struck off. The application for encl 262 was dismissed with costs. Hence, the present appeal. The appellant submitted that without a director's resolution, neither the company nor the solicitors were authorised to commence legal proceedings against the appellant.

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Held, allowing the appeal:

(1) The appeal was against the application of encl 262, which was made on 12 May 2011 to set aside orders obtained on 16 April 2001, some ten years earlier. Although encl 262 was commenced on 12 May 2011 to set aside an order made on 16 April2001, the basis of the application was established only in the order obtained on 19 February 2008. The 19 February 2008 order made it abundantly clear the actions pursuant to the power of attorney dated 28 July 1999 were null and void. It was not available on 16 April 2001 (see para 13).

(2) The order of 16 April 2001 was sealed and was a final order, and the court which made that order was functus officio. The two exceptions mentioned were under O 20 r 11 of the RHC as to the slip rule in so far as it was necessary to correct errors in expressing the intention of the court; and where the order related to a judgment in default or made in the absence of a party at the trial or hearing (see para 14).

(3) The exceptions were not set out as a final or exhaustive list, but more to the point was that the functus officio principle applied to the decision the court had to make at the time. However, in this case, there was a fundamental change to the foundation of facts upon which that decision and order was made, in that the very authorisations relied upon for undertaking the application was declared null and void. The natural result was that the basis of authorisations to obtain the order made on 16 April 2001 was null and void (see para 15).

[Bahasa Malaysia summary

Responden pertama syarikat ('Asian Mining Services') memiliki 100% saham di dalam responden kedua syarikat ('Selinsing Mining'). Perayu ('Sim') adalah pemegang berdaftar saham sebanyak 999 daripada 1,000 saham di dalam Asian Mining Services. Saham satu lagi dipegang oleh pengerusi Lembaga Asian Mining Services yang dilantik ('Peter'). Apabila Sim meletakkan jawatan, dia kekal sebagai pemegang saham utama Asian Mining Services dan pengarah Selinsing Mining. Sim memfailkan tindakan di Mahkamah Tinggi memohon untuk membatalkan surat kuasa wakil yang diberikan kepada Dakar Security Services Ltd, mengisytiharkannya dan kesemua tindakan dan perkara yang dibuat berikutan kepada surat kuasa wakil tersebut terbatal dan tak sah. Mahkamah Tinggi membenarkan permohonan Sim (lampiran 45) sebagai pempetisyen dan membuat perisytiharan dan perintah yang menyebabkan kesemua transaksi yang dibuat oleh Peter Kestel dan Dakar Security Services Ltd menggunakan surat kuasa wakil dan termasuk pemindahan keseluruhan saham milik Sim dalam Asian Mining Services, pembatalan saham-saham Sim dan menerbitkan sijil saham baru tak sah, dan mengekalkan kedudukan Sim. Saman pemula dimulakan oleh Asian Mining Services and Selinsing Mining sebagai plaintif menamakan Sim sebagai defendan memohon bahawa kaveat

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persendirian yang dimasuki oleh Sim dibatalkan. Kemudiannya, Mahkamah Tinggi membatalkan kaveat dan ganti rugi untuk memasukkan kaveat ditaksir. Asian Mining Services dan Selinsing Mining memperolehi penghakiman terhadap Sim mengarahkan Sim untuk membayar sebanyak RM146,785.50 sebagai kos sebenar; RM849,500 sebagai sewa yang dibayar kepada PKNP dan RM532,000 sebagai liabiliti sewa yang dibayar kepada PKNP. Sim memulakan lampiran 262 terhadap Asian Mining Services dan Selinsing Mining berikutan kepada A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), memohon perintah bahawa perintah-perintah diketepikan dan dibatalkan. Permohonan untuk lampiran 262 ditolak dengan kos. Maka, rayuan ini. Perayu berhujah bahawa tanpa resolusi pengarah, syarikat atau pun peguamcara tidak dibenarkan untuk memulakan prosiding undang-undang terhadap perayu.

Diputuskan, membenarkan rayuan:

(1) Rayuan adalah terhadap permohonan lampiran 262, yang dibuat pada 12 Mei 2011 untuk mengetepikan perintah-perintah yang diperolehi pada 16 April 2001, lebih kurang sepuluh tahun terdahulu. Walaupun lampiran 262 bermula pada 12 Mei 2011 untuk mengetepikan perintah yang dibuat pada 16 April 2001, asas permohonan hanya dibuktikan dalam perintah yang diperolehi pada 19 Februari 2008. Perintah 19 Februari 2008 telah dibuat dengan jelas bahawa tindakan-tindakan berikutan surat kuasa wakil bertarikh 28 Julai 1999 adalah terbatal dan tak sah. Ia tidak terdapat pada 16 April 2001 (lihat perenggan 13).

(2) Perintah 16 April 2001 dimeterai dan adalah perintah akhir, dan mahkamah yang membuat perintah tersebut adalah functus officio. Dua pengecualian yang dinyatakan adalah di bawah A 20 k 11 KMT setakat kaedah khilaf kerana ia adalah perlu untuk membetulkan kesilapan dalam menyatakan niat mahkamah; dan di mana perintah berkaitan kepada penghakiman ingkar atau dibuat dalam ketidakhadiran pihak semasa perbicaraan atau pendengaran (lihat perenggan 14).

(3) Pengecualian tidak ditetapkan sebagai senarai terakhir atau lengkap, tetapi lebih kepada prinsip functus officio yang diaplikasi kepada keputusan mahkamah mesti dibuat pada ketika itu. Walau bagaimanapun dalam kes ini, terdapat pertukaran hubungan kepada asas fakta di mana keputusan tersebut dan perintah yang dibuat, adalah kuasa yang diguna untuk membuat permohonan tersebut disytiharkan batal dan tak sah. Keputusan biasa adalah bahawa asas kuasa untuk mendapatkan perintah yang dibuat pada 16 April 2001 adalah terbatal dan tak sah (lihat perenggan 15).]

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Cases referred to

Hock Hua Bank v Sahari bin Murid [1981] 1 MLJ 143, FC (consd)
Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors [2001] 1 MLJ 451, HC (refd)
Sanyan Lumber Sdn Bhd v Sanyan Wood Industries Sdn Bhd [2008] 8 MLJ 336, HC (refd)
Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors [1991] 1 MLJ 211, HC (refd)
Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd [1990] 3 MLJ 239, HC (refd)
United Investment and Finance Ltd v Tee Chin Yong & Ors [1967] 1 MLJ 31 (refd)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 11, O 92 r 4

Appeal from: Originating Summons No 24–64 of 2001 (High Court, Kuantan)

Vignesh Kumar Krishnasamy (Balendran Chong) for the appellant.
V Sithambaram (Ahmad Rizal, Sara Idylla & Co) for the respondents.

Abdul Wahab Patail JCA:

[1] Having heard the parties, this court had allowed with costs the appeal by the appellant/defendant Sim Tze Chui ('Sim') and ordered:

(a) orders of the High Court dated 4 November 2011 other than the order as to quantum of costs set aside;

(b) orders granted per prayers (a), (b), (c) and (d) of encl 262;

(c) costs of this appeal fixed at RM10,000; and

(d) deposit refunded.

BACKGROUND

[2] The first respondent company Asian Mining Services Sdn Bhd ('Asian Mining Services') owned 100% of the shares in the second respondent company Selinsing Mining Sdn Bhd ('Selinsing Mining'). Sim is the registered shareholder of 999 shares out of 1,000 shares in Asian Mining Services. The other share is held by Peter Steven Kestel, appointed chairman of the Board of Asian Mining Services. When Sim resigned on 18 February 2000, Kenneth

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John Baker ('Baker') was appointed a director of Asian Mining Services to replace Sim. Sim remained the major shareholder of Asian Mining Services and a director of Selinsing Mining.

[3] The matter began with Peter Kestel writing on 1 October 2000 to Sim:

> This letter is to inform you that 999 shares issued to Sim Tze Chui in Asian Mining Services Sdn. Bhd. were transferred on Friday the 29th September. This was as per the stamped transfer using a power of attorney stamped registered in the high (sic) court (sic) of Malaysia between Sim Tze Chui and Dakar Security Services Limited relating to all of the shares held by Sim Tze Chui in Asian Mining Services Sdn. Bhd. presented to the board at its meeting convened on 2nd September 2000. The share script issued to Sim Tze Chui has been cancelled and new shares issued to the recipient.
>
> The company request that you return the cancelled share certificates to the company secretary, along with all other documents including contracts, correspondence and property owned by the company that you may have in your capacity as the former solicitor and fiduciary on behalf of Dakar security (sic) Services Limited and Asian Mining Services Sdn Bhd.

[4] Sim filed an action in the High Court in Kuala Lumpur Suit No S2(S5)–22–32 of 2001 where he sought to revoke the power of attorney dated 28 July 1999 given to Dakar Security Services Ltd, declaring it and all actions and matters done pursuant to the said power of attorney null and void.

[5] The High Court allowed Sim's application at encl 45 as the petitioner on 19 February 2008, and made the following declarations and orders:

> DENGAN INI ADALAH DIPERINTAHKAN bahawa plaintif diberi kebenaran untuk memasukkan satu Penghakiman Ingkar Pembelaan terhadap defendan pertama dan defendan kedua menurut Aturan 19 Kaedah-Kaedah Mahkamah Tinggi 1982 seperti di dalam Writ Saman dan Pernyataan Tuntutan bertarikh 17 Julai 2001 seperti berikut:
>
> (a) suatu deklarasi bahawa 'Surat Kuasa Wakil' kononnya yang bertarikh 28 Julai 1999 dan didaftarkan dalam Mahkamah Tinggi Kuala Lumpur No. Pendaftaran 74562/00 pada 20 September 2000 ('Surat Kuasa Wakil tersebut') adalah terbatal dan tidak sah;
>
> (b) suatu perintah diberikan supaya Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur mengenepikan, membatalkan, memotong dan/atau menghapuskan salinan asal dan/atau salinan-salinan lain 'Surat Kuasa Wakil' tersebut dan atau pendaftarannya di pejabat-pejabat pihak-pihak berkuasa yang lain ataupun mana-mana tempat serta-merta;
>
> (c) suatu deklarasi bahawa apa-apa tindakan (termasuk resolusi-resolusi mesyuarat) apa perjanjian-perjanjian, transaksi-transaksi, dokumen-dokumen, surat-surat atur cara-atur cara atau apa-apa tindakan

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apajuapun yang telah dilaksanakan ataupun akan dilaksanakan berdasarkan 'Surat Kuasa Wakil' tersebut adalah terbatal dan tidak sah;

(d) suatu perintah agar defendan-defendan sama ada secara sendiri, melalui orang gajinya, ejen dan/atau pengkhidmatnya atau dengan apa jua cara lain, dihalang dan satu injunksi adalah dengan ini diberikan untuk menahan defendan-defendan orang gajinya, ejen dan/atau pengkhidmatnya atau sebaliknya daripada menggunakan, mengemukakan Surat Kuasa Wakil tersebut apajuapun dan/atau meneruskan, melaksanakan, mengemukakan dengan apa-apa perjanjian-perjanjian, transaksi-transaksi, dokumen-dokumen, surat-surat, aturcara-aturcara atau apa-apa tindakan apajuapun yang telah dibatalkan dan tidak sah mengikut perintah dalam perenggan-perenggan kecil (a), (b) and (c) di atas;

(e) suatu perintah agar defendan-defendan sama ada secara sendiri, melalui orang yang digajinya, ejen dan/atau pengkhidmatnya atau dengan apa jua cara lain mengemukakan, menghantarkan dan/atau menyerahkan 'Surat Kuasa Wakil' adanya dan/atau penduanya tersebut termasuk kesemua salinan-salinannya kepada Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur supaya salinan-salinan 'Surat Kuasa Wakil' tersebut boleh dihapuskan, dipadamkan, dipotong serta-merta;

(f) Gantirugi am;

(g) Faedah;

(h) Kos DAN kos permohonan ini adalah ditanggung oleh defendan-defendan.

[6] That rendered all transactions made by Peter Steven Kestel and Dakar Security Services Ltd using the power of attorney and including the transfer of the entire shares of Sim's in Asian Mining Services, cancellation of Sim's shares and issue new share certificates void, and maintained Sim's position.

IN ORIGINATING SUMMONS NO 24–64 OF 2001

[7] Originating Summons No 24–64 of 2001 was commenced on 29 March 2001 by Asian Mining Services and Selinsing Mining as the plaintiffs naming Sim as the defendant. Asian Mining Services and Selinsing Mining sought orders:

(a) Kaveat persendirian yang dimasukkan oleh Defendan, No Perserahan 2/2001, Jilid 1 Folio 49 keatas tanah lombong MC 1/70, Mukim Ulu Jelai, Tempat Sungai Kermoi, Negeri Pahang Darul Makmur, dibatalkan.

(b) Gantirugi, akibat dari kaveat tersebut ditaksirkan dan dibayar oleh defendan kepada Plaintif-Plaintif.

(c) Kos permohonan ini dibayar oleh Defendan kepada Plaintif-Plaintif.

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[8] On 16 April 2001, Asian Mining Services and Selinsing Mining obtained against Sim as follows:

> MAKA ADALAH DIPERINTAHKAN bahawa kaveat persendirian yang dimasukkan oleh defendan, No Perserahan 2/2001, Jilid I Folio 49 keatas tanah lombong MC 1/70, Mukim Ulu Jelai, Tempat Sungai Kermoi, Negeri Pahang Darul Makmur, dibatalkan;
>
> DAN SELANJUTNYA DIPERINTAHKAN bahawa gantirugi, akibat dari kaveat tersebut ditaksirkan dan dibayar oleh Defendan kepada Plaintif-Plaintif;
>
> DAN AKHIRNYA DIPERINTAHKAN bahawa kos permohonan ini dibayar oleh Defendan kepada Plaintif-Plaintif.

[9] On 10 May 2010, Asian Mining Services and Selinsing Mining obtained against Sim orders:

(a) Bahawasanya defendan dikehendaki membayar kepada plaintif pertama perbelanjaan sebenar sejumlah RM146,785.50, DAN

(b) Bahawasanya defendan dikehendaki membayar kepada plaintif kedua sejumlah;

(i) RM849,500.00 yang merupakan bayaran sewa yang telah dibayar kepada pihak PKNP dari Januari 2003 sehingga suku ketiga tahun 2008; DAN

(ii) RM532,000.00 yang merupakan tanggungan untuk membayar sewa kepada pihak PKNP dari suku ketiga tahun 2008 sehingga Mac 2012.

[10] On 12 May 2011, Sim commenced the application at encl 262 against Asian Mining Services and Selinsing Mining pursuant to *Aturan* 92 *k* 4 Kaedah-Kaedah Mahkamah Tinggi 1980 seeking orders that:

(a) Perintah bertarikh 16 April 2001 diketepikan dan dibatalkan;

(b) Segala Perintah-Perintah berkaitan dengan Perintah bertarikh 16 April 2001 iaitu Perintah-Perintah bertarikh 10 Mei 2010 dan 17 Februari 2011 diketepikan dan dibatalkan;

(c) Saman Pemula bertarikh 29 Mac 2001 diketepikan dan dibatalkan;

(d) Kos permohonan ini ditanggung oleh Peter Steven Kestel (Passport Australia No: E7022484), Zaidi Bin Harun (NRIC No: 701224–04–5307) dan Abas Bin Johar (NRIC No: 430110–06–5295);

(e) Relif lain gang didapati suaimanfaat oleh Mahkamah Yang Mulia ini.

[11] The application at encl 262 was dismissed on 4 November 2011 with costs fixed at RM3,000. The appellant appealed to this court by notice of appeal dated 15 November 2011.

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[12] Before this court, the appellant relied upon the same grounds set out in support of the grounds in encl 262 before the High Court, that without a director's resolution, neither the company nor the solicitors were authorised to commence legal proceedings against the appellant. In support of this submission, counsel relied upon *Malaysia Land Investment Co (Pte) Ltd v Sathask Realty Sdn Bhd & Ors* [2001] 1 MLJ 451; *United Investment and Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31; *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211; *Sanyan Lumber Sdn Bhd v Sanyan Wood Industries Sdn Bhd* [2008] 8 MLJ 336. As to solicitors, counsel relied upon *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555; *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239.

[13] We considered the appeal in respect of the application at encl 262 in the context of it being made only on 12 May 2011 to set aside orders obtained on 16 April 2001, some ten years earlier. In doing so, we observed that though encl 262 was commenced on 12 May 2011 to set aside an order made on 16 April 2001, the basis of the application was established only in the order obtained on 19 February 2008 in Suit No S2(S5)–22–32 of 2001. The 19 February 2008 order made it abundantly clear the actions pursuant to the power of attorney dated 28 July 1999 were null and void. It was not available on 16 April 2001.

[14] We considered the fact that the order of 16 April 2001 is sealed and is a final order, and that the court having made that order is functus officio. The Federal Court decision in *Hock Hua Bank v Sahari bin Murid* [1981] 1 MLJ 143 was cited for the proposition that an order cannot be altered, waived or set aside as the court has become functus officio and it has no jurisdiction to alter, vary or set aside a final order. It was conceded that the Federal Court did also rule there are exceptions. The two exceptions mentioned were (a) under O 20 r 11 of the Rules of the High Court 1980 as to the slip rule in so far as it is necessary to correct errors in expressing the intention of the court; and (b) where the order relates to a judgment in default or made in the absence of a party at the trial or hearing.

[15] We concluded that the exceptions was not set out as a final or exhaustive list, but more to the point is that the functus officio principle applies to the decision the court had to make at the time. But in this case, there is a fundamental change to the foundation of facts upon which that decision and order was made, in that the very authorisations relied upon for undertaking the application was declared null and void.

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[16] That being so, the natural result is that the basis of authorisations to obtain the order made on 16 April 2001 were null and void. In the circumstances, we allowed the appeal and granted the orders set out at para [1] above.

Appeal allowed.

Reported by Afiq Mohamad Noor